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RATIONALISM AND THE MODERN STATE

by

PATRICK NERHOT

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European University Institute
Badia Fiesolana
I - 50016 San Domenico (FI)
Italy

Rationalism and the Modern State

Thinking about the law raises many problems, not least among them that of definition. The same is true of the State. Paul Valery said in this connection: "We easily speak of law, the state, race or property; but what is law, the state, race or property? We know and we do not know" (1).

The fact that there remains some mystery even after a definition has been attempted indicates that the question itself leads to the problem of origins; and this is a point where the foundations that should solidly underlie our reasoning are sadly lacking. As Michel Villey points out: "The history of the notion of the "subjective" right of the individual has yet to be written; it would be worth writing, though that could not be done without effort ..." (2).

Nevertheless, this subjective right is there; it defines us and as such acts with genuine material force in making our world what it is, even though there remains a mystery at the bottom of it. In taking as a subject for this paper that of rationalism and the state, we by no means intend to give a definition going back to the origins of the law or of the state. We propose, much more modestly, to seek to give an account

of what the state based on the rule of law seems to us to achieve.

For Max Weber, the distinctive character of modern Western law was the rationalization of law. Michel Villey's studies have very largely corroborated this viewpoint (3). The process of rationalization takes place progressively, essentially over three centuries: the 16th century saw the emergence of a rationalization of the law, the 17th that of major syntheses and the 18th took up the content of these 17th-century syntheses.

The work done by the 16th-century jurists in history of law was a major one: scholarly systems were constructed, later to underlie the modern codifications of the late 18th century. The predominant idea was that of formulating definitions, of founding a system (Althussius) and "legal science in the strict sense, which is part of the broader entity of dicaeological science, would henceforth have as its object the study of subjective rigths" (4). The rationalization process had begun and was to occupy ever new ground.

After this stage of definitions, of the elaboration of systems, legal rationalism triumphs through the carrying out of two essential operations: a classification of rights and the setting up of the division between the

"facts" and the "law" (Grotius). The consequence is that the law will be found in the rules pre-imposed on the judge and "to be found systematized in the treatises of doctrine" (5).

Likewise in the 17th century, mainly under the impetus of Descartes and in parallel with the rise of the sciences, a new philosophy arose: nature became what is measurable, the quantitative; and chance and natural laws were transformed into accounting decisions (later, into governmental decrees (6)).

Modern science invaded the whole social field, and utilitarianism began to invade the philosophy of law: "Among so many philosophies elaborated and practised over so many years, it would be hard to cite a single one tending towards the benefit of mankind and the increasing of resources." "Let us then, my sons, leave aside all these abstract philosophies ... let us not seek the glory of founding a sect, but busy ourselves seriously with human wealth and greatness" (7).

Descartes' method goes back to the primacy of logic - deduction and syllogism - as a privileged tool for the systematization of law; this induced the jurists of the 18th century to put the law in order. This idea of - formal - order dominated the 18th century. A.J. Arnaud (8) writes in this connection: "The systematization of

legal knowledge constitutes one of the functions of legal thought. The other consists in the systematization of argumentation and conduct ... The law is well suited to be 'brought to reason'. The law's function is to maintain a social order ... there follows a need for formal coherence".

Legal rationalism in effect seeks the unification, simplification and systematization of legislation. The 18th century was to see the fight against autonomous groupings, legal particularities: the rational need of merchants for predictability corresponded to the need for regularity of laws. The ambition was to apply the spirit of the sciences to the law. The influence of Euclid on the thought of Hobbes is well known. This science that attracted Hobbes was utilitarian, with the individual as its basis, and the law was to be a quality of the subject. This is where legal positivism would find its source (9).

This rationalism does not work solely in the law; we know that it tends to embrace all areas of social life. Nothing escapes it, all the more so because henceforth it was to be expressed through an incomparably well suited tool for the purpose, namely the state. There was a desire to see in the state a liberating structure: a state based on the rule of law as a counter to exercise of tyranny. It would seem that now, at the end

of the 20th century, this view has been considerably moderated. Be that as it may, it is still admitted that this state based on the rule of law did organize liberty, and that in this connection 1789 was a major historical cutoff point. Our proposition would consist in showing that that point in history should be seen not so much as a break, but as a continuity, due to rationalism. To this end, a first part will be devoted to rationalism and the absolutist state, and a second part to a presentation of rationalism and the state based on the rule of law. We shall thus be leaving the area of the law proper - though we shall return to it for the conclusion - in order to seek to pick out the main lines it was henceforth to follow and to be defined along. This is because we regrd such an excursus as an essential preliminary to a consideration of the law, which though it does constitute a separate field of study is after all only one dimension of social life and derives its meaning from it alone. To forget that would be to condem oneself to fail to understand the major changes our law has gone through during the wohle of the modern epoch. As a guide along the way we have recourse to political science, for that is the science we feel best able to enlighten us about the State, the source of law in modern times.

Part I: Rationalism and the absolutist state

In view of the breadth and abundance of analyses done on this period, there seems no great need for descriptive analysis here of the absolutist state. It is instead our intention in this paper to seek to pick out the historical meaning underlying the creation of the absolutist state. This meaning was outlined by Alexis de Tocqueville as long ago as 1856 in his "l'Ancien Regime et la Revolution": "Administrative centralization is an invention of the Ancien Regime ... if then the centralism of the Ancien Regime could be transported in its entirety into the new society and incorporated therein, that is because this centralization was itself the beginning and the harbinger of this revolution" (pp. 76 - 116).

This centralism was a creation of rationalism. We shall look at it from two aspects: within the monarchical administration (I) and within civil society (II).

I. Rationality and the monarchical administration

Rooted in feudal society, the monarchical administration of the Ancien Regime in France was a political centre organized over the whole territory, thereby bringing about considerable development of the civil service. Many have seen in this (especially in recent analyses) the necessary manifestation of a new economy. Theoretically, however, the state guarantee of rights is

not essential to any fundamental economic phenomenon (10). If then such a power structure, meeting very specific needs, had become necessary, this was not solely for economic interests guaranteed by the law, but especially because the latter guaranteed authority situations.

Since the 16th century, trading companies have been organized in the basis of enormous capital requiring serious guarantees. This necessitated on the one hand the predictable application of the law, according to traditional rules; and on the other the monopolization and regulation of all legitimate power of constraint through a single organism tending to universality. This fact posits the dissolution of all feudal power mechanisms. Finally (but only so) - and this effect is combined with those we have just mentioned - "the immobilization of the political and administrative apparatus" (11) accelerates the "primitive accumulation" of wealth.

The financial role of Paris was to be all the more important for the absence in the French kingdom of the institutional machinery for consent to taxation. The financial devices were extremely varied, going from bonds to the sale of public office. To provide its financial resources, the monarchical administration was to become a fiscal state, with the financial

administration as its nucleus. But above all, this fiscal state was to bring about a process of rationalization whereby office, instead of being a mere source of tax revenue, became a factor for cohesion and for social integration, as being a technique for specifying public functions that rises above the feudal system. The efforts of the monarchy were concentrated on top-level staff, contributing towards welding them into a body lying outside the feudal network (12). The administration became the instrument of monarchical sovereignty, being hierarchical and understood as a means of authoritarian government (13).

The need for a permanent, rigid administration conditioned the existence of the bureaucracy as a nucleus for any mass administration. 18th century capitalism represented the most rational economic foundation. Thanks to it, the bureaucracy could take on its most rational form, since it enabled it through taxation to control the necessary financial resources (14). The need for predictability and for confidence in the functioning of the legal and administrative organization led the new classes to hold the various forms of feudal power through a body whereby they controlled administration and finance and participated in changes to the legal organization. In fact, "the fixed-capital, profit-making firm, with a rational organization based on free labour and operating on the

private consumer market, is the form most sensitive to the irrationalities of justice, administration and taxation, which disturb the possibility of calculation (15). The increasingly important role played by written regulations was one of the practical manifestations of this process of rationalization, and explains the great importance assigned to lawyers in the period. The formalization (and legalization) of the law in fact accelerated the economy, already rational in form (16).

All this brings up the principle of legal domination, the purest type of which is bureaucratic administration. Legal domination and bureaucratic administration tend towards what may be called "objective domination" (A) which was to turn the recruitment procedure of the concours into the major tool of bureaucratic domination of the "purest" type (B). To that extent, we may consider this recruitment procedure as the manifestation of objectivized domination (and, conversely, its absence allows the existence of brakes to such a type of domination to be deduced).

A. Objective domination

Objective domination consists on the one hand of legal domination and on the other of rational domination.

Legal domination. Simplifying, we may say that legal

domination plays a part in objective domination by tending to exclude the arbitrariness of pure force - as the exercise of power. In this sense, legal domination is opposed to all forms of government that would ultimately depend on the arbitrary will of a subject. That is the function of the law. "Lawyers, and few but they, know from experience the truth that love of country proceeds from devotion to the law" (17). Objectivization is in fact brought about by the rule of law. This objectivization may be established rationally (pact, contract); it may be oriented towards "rationality as an end", as a value or as both (M. Weber).

The essence of the law is a "cosmos" of abstract rules, intentionally decided, which rationally organize justice, the application of the rules, the administration, and control over the interests provided for through regulations, within limits laid down by the rules themselves (18). In terms of power, this also means that those who hold it exercise it in observance of the impersonal order whereby they orient their measures. Likewise, those who obey obey only the law: power resides in impersonal arrangements that put limits on objective competence which are rationally defined by the regulations themselves.

The complete rationality of exercise of power consists

in the last analysis in the absence of appropriation of a post by its occupant. Its holder thus exercises a power which is the "right of the function", while he himself has only a "right to the function". This was far from already having been realised under the French Ancien Regime. The intendants under Louis XV readily confused "right of office" and "right to office". Furthermore, there was profound interference from "le fait du Prince" (to which 1789 was intended to give an answer; see below). However, the main steps towards achieving objective domination were taken in this period: the setting up of an administrative and bureaucratic power within which legal domination was conceived.

Firstly, as a mass administration, such a form of power was inevitable. Secondly, because technically it gives the best performance; it is "the most rational form" from the formal point of view. This performance is the result of very great specialization in knowledge (19), and it is therein that the great superiority of this form of power lies. On the other hand, bureaucratic administration means domination through knowledge (a specifically rational fundamental character for Max Weber, and the major political conflict of the 19th century in France was to centre principally on the question of the monopoly of education; see below).

The second characteristic, of objective domination is that it is rational. This follows from the first characteristic and, taking up from Max Weber, we may reduce the fundamental categories of rational domination to four (20). These are the continous operation of a civil service, an administrative hierarchy, rules (techniques or norms) calling for professional training, and therefore for "competence" . In reality, these four characteristics interpenetrate. Thus, the combination of continuity and hierarchy produces what is known as "esprit de corps", which yet more strongly welds together both the hierarchy and the continuity. In the same way, the hierarchy becomes an organized "cursus" through objective rules, and these two characteristics nourish each other. Finally, it is in the name of "competence" that these three characteristic of rational domination are founded.

1. The continuity of the civil service. The advantage of this power in both efficiency and rationality is that is made to last. By contrast with the form of feudal power, the exercise of a policy is not subordinate to the person responsible for pursuing it. "The king is dead, long live the king." The essence of this continuity is the objectivization of the power exercised. From the absolutist state, is in fact, brings about objectivization through institutions that "guarantee the permanence and cumulativity of both the

material and the symbolic heritage", a heritage which "may persist without the actors having continually to recreate it, in its entirety, through explicit action" (21). The ostentatiousness of the prince would obviously be contrary to a power regulated through rules and institutions (22).

2. Hierarchy: It is needless to insist on this point. Let us merely stress that the objective rule is all the more important in regulating this type of relationship because the hierarchy brings about a domination that tends to appear as subjective (23)

3. Rules: These rules are to be understood in a broad sense; they are not only those through which state power is exercised, objectively over civil society, but also those that regulate the very individuals within the hierarchical administration: this is the place of the object and not of the subject (24). Thus, they are objective rules giving the subject his competence, understood as the area of duty of objective execution (25). But at the same time, these rules presuppose another "competence", that which depends on a specialized power (26).

4. A "competence". This means that, by contrast with personal authority which may neither be delegated nor transferred by inheritance, "the title as a formal

instrument for evaluating the positions of the functionary within a distribution allows equivalence relations to be set up ... Accordingly, the power and dependence relationships are set up not directly between persons; but, in objectivity itself, between institutions, i.e. between socially guaranteed titles and socially defined posts" (27).

The bureaucratic, hierarchicalized administration is organically linked to a hierarchical educational system. " A system of hierarchicalized examinations crowning specific training and opening entry to specific careers appears along with the development of the needs of a bureaucratic organization which seeks to make hierarchicalized, comparable individuals correspond to the hierarchy of posts offered" (28). Max Weber continues: "To the purest recruitment (there corresponds) the purest bureaucratic domination" (29).

This purest recruitment was to be realized through the procedure of competition (30), and it is at least curious that this mode of recruitment is today to be presented to us as the outcome of the revolution, and therefore the highest form of "equality", at long last realized. As we have already said (31), it is not solely economic interests that are guaranteed by the law, but above all authority situations in the

political, ecclesiastical and personal areas. Accordingly, a legal regulation may persist unchanged despite radical changes in economic relations. To be specific, the competition procedure as the objectivization of the exercise of power by an institution came out of the Council of Trent. Consequently, seeing the origin of this procedure in the 19th century (32) and its basis in a supreme materialization of the principle of equality means making a double error. On the one hand historically - which is trivial - but above all, that of failure to perceive what this legal technique represents: it is first and foremost cooptation by a constituted body. (The law organizes an authority situation; that such a procedure should have come into being at the time of the Reformation is surely not without significance).

B. Competitive examination as the manifestation of the purest bureaucratic domination

We shall not here go into what competition procedure achieved under the Council of Trent (33). We shall however point out that the legal system of competitive examination set up by the Council was precisely that of the competitive examinations of modern lay states, or that set up by, for instance, the European Economic Community. Let us simply recall that an institution as an "operating system" is observable in the political

organization set up by the Christian church in the West. Christian universalism in fact amounted to a vast administrative system, increasingly hierarchicalized as history advanced (34). At the same time and in parallel, an educational system had been set up (35).

The procedure of competitive examination thus saw the light because these two elements existed, and the two criteria that served as a basis for the "sounding" of the candidate were on the one hand the absorption of standard knowledge, and on the other the certainty for the constituted body that the candidate would be "useful and profitable". Thus, this practice was to last throughout the 16th, 17th and 18th centuries. The educational beacon of the 18th century was that of the Jesuits (to whom the competitive examination procedure at the time of the Council is due), which turned out a "homo hierarchicus". Under their control, the faculties served only for conferring the degrees necessary for the conferment of certain benefices (36), and the content of the teaching was completely cut off from the concerns of the moment (37). The point was "not to judge the past with the ideas and the cast of mind of the present"; the renewal of scientific and philosophic thought took place outside them (38).

Nevertheless, the new classes were to take up this form of appointment for their own account. "By equipping the

educational institution with particularly efficient means for imposing the hierarchy's educational cult and hence the educational hierarchy itself, and by putting these means at the service of the autonomization of educational life by giving it a complete culture completely cut off from life, the Jesuits' educational invention enabled this institution to specify its generic tendency to autonomization in the primacy conferred on the function of self-perpetuation" (39). This was in fact what the new classes were to achieve: a readjustment of the power mechanisms - an objectivization - through this function of self-perpetuation. "Before the system of machinery assuring by its own notion the reproduction of the established order is set up, it is not enough for the rulers to simply let the system they control run by itself if they are to exercise their rule durably ... Being incapable of contenting themselves with appropriating the profits of a social machine as yet unable to find within itself the power to perpetuate itself, they are condemned to the elementary forms of domination , i.e "the direct domination of one person over another" (40).

This is precisely what legal and rational domination seeks to avoid, and the first experiments at the "purest" bureaucratic domination begin to see the light. The "literary public sphere" (see below), born as a

consequence of the monarchical administration of the 18th century, far from seeking the destruction of the state was instead itself to be mediatized through a state power meeting its own needs. The slogan of this mediation was the principle of equality, understood as equality of access to public employment. The first historical example we find is that brought about by the school of the Ponts & Chaussees (41). This was not by chance: the rationalization of trade presupposed the rationalization of the circulation of goods, which in turn meant new men. These were the engineers.

Louis XV's minister Trudaine organized, in rationality, a ministry (42) which was to be a centre of technical training where one could, through successive stages, reach the grade of ingenieur. The knowledge acquired was based on the exact sciences, among which mathematics predominated (43). Trudaine decided that all Ponts & Chaussees engineers would henceforth be chosen from this school: the monarchical administration became a professional centre, bringing about a monopoly situation. The four fundamental categories of rational domination were combined in it; the young ingenieur, subject to severe obligations, had no rights vis-a-vis the administration. Being bound by professional secrecy, he was the state's devoted servant. His first duty was obedience to his superior. His training was to be his "competence", understood as the field of

objective execution of duty and as professional training.

When Louis XV once suggested a nominee of the Marquise de Pompadour for a post of chief engineer, Trudaine opposed this, and the appointment was not made. For the first time, legal domination was imposed: the objectivization of the exercise of power through the rule of law began to be realized.

II. Rationality and social equality

The appearance of national and territorial aspects destroyed the foundation of feudal power. The distinction between the "public" and the "private" was not current within feudal society (44), and Louis XIV's monarchy redefined a territorial policy (45). This state which was constituing itself brought into being a social sphere which tended to detach itself from the state. The exercise of power realized through representation, i.e. power affirmed by a subject constrained to an ostentatory role, was counterposed to a state which, through its bureaucracy and its army, rendered itself independent of the court. It was no longer necessary for power to be shown, and "it asserted itself more solidly as a tangible partner to those subject to it" (46).

These latter were private persons, excluded from the "public power", and public became a synonym for governmental. Private economic activity became based on a wider exchange of commodities, and placed under the control and guidance of the public sphere. This tangible partner" that the absolutist state was becoming brought about the birth of what was henceforth to be its counterpart: "the public sphere", i.e. the area of "continous participation in the exercise of reason, controlling the "public powers" and therefore developing within the political sphere.

In this connection, the hard core of the modern public sphere is made up of all the officials of the monarchical administration, above all the lawyers. To these should be added the representatives of the modern economic world: manufacturers, bankers, traders, educated people. The circles of educated landowners were the foundation, under the leadership of intellectuals, professors, lawyers, doctors, teachers, chemists, manufacturers, landowners etc. for the local political clubs, the basis for this public sphere.

This public sphere developed to the extent that the public interest in the private sphere was not defended by the authorities alone, but taken over by the subjects, who saw it as their own business. For this reason, "public regulation and private initiative were

the two terms of the ambivalence which characterized the authority/subject relationship" (47). It was precisely this area wher power came into relation with private persons through the intermediary of the royal administration that will be the object of critical discussion.

The new society that was consolidating in the face of the state delimited a private area vis-a-vis the authority; but at the same time, it made the reproduction of existence into a matter of public interest. It was precisely there that the dominating political expression - royalty - became antinomic to the ruling political expression - the new classes.

The Ancien Regime was marked politically by the king's mediating role between the various estates. The third estate, in this organization of power, could not present itself as a state controlling any power: "The power to dispose of property was part of the private sphere, and accordingly the new classes - as private persons - exercised no power" (48).

For this reason, contrary to the feudal political demands, their demands on the authorities were not directed against the concentration of political authority which was to be distributed. (This idea was to arise only in the XIXth century, as Henry Michel

judiciously points out: "L'idee de l'Etat"). On the contrary, they attacked the principle defended by the established powers: the control principle that the "public" opposed to the latter was aimed at transforming the nature of the domination (49).

The need expressed by the public through the use it made of reasoning necessarily led if it were to succeed in imposing itself, to more than the mere redistribution of the bases for which the domination drew is legitimacy (50). By opposing the Court in cultural and political connections, the town - the location of trade - represented a "literary public sphere" whose institutions were the cafes, salons, meetings etc. Well before the public character of power was disputed by the political reasoning of private persons, this literary public sphere constituted the ground for public argument, and represented the process by which private persons analysed and criticized among themselves the personal experiences they had within the new private sphere (51).

Progressively, the literary discussion was to become political, i.e. the place where the public character of power was to be disputed through the political reasoning of these private persons. This was the middle of the 18th century. The new classes were excluded from state power where they held all the key posts in the economy,

and the monarchical administration was the centre of power. In this political and social environment, the salons formed a special enclave where the nobility and the big bourgeoisie, the bankers and administrators, could meet on an equal footing. ."It was less the political equality of the members of these societies than their exclusion in general from the political area reserved to absolutism that was decisive" (52). Social equality was initially possible only as equality outside the bureaucratic administration. The "legitimacy" came firstly from outside the bureaucratic administration, and the point was always to investigate that apparatus, not to transform it (53).

The political function of the "critical" public sphere was to assure control over civil society. In the discourse of Reason, right was to be opposed to absolutism. This public opinion felt itself to be the only legitimate source of these laws; "voluntas" became transferred into "ratio" (54). The rule of law, identical for all, had the aim of an minilating all forms of "voluntarist" domination. The idea of a state based on the rule of law, of norms legitimated by public opinion, goes back to a rational - objective - regulation of power, which can be expressed in the most total manner, as we have seen, only through the intermediary of a bureaucratic administration and an educational system.

But at the same time, this absolutist state accelerated the economic rationality whereby the market, subordinated to the administrative authority of the prince, tended to become detached from the obligations linking it into the corportions. The prince was, to be sure, "in the last instance" a brake on rationalism, but he nevertheless remained a potantial ally in disentangling the market from feudal cluches.

1789 was hence to appear as a political revolution; the point was to get rid of the prince, but above all because he was a brake on rationalism; this was to be the second characteristic of the revolution: rationalist more than individualist.

What did 1789 achieved* A new legitimacy, which amounted to a broadening of the state field. Two spheres were henceforth to coexist within the state based on the rule of law: the political public sphere, corresponding to the aspect of the subject and functioning through publicity, and the state sphere, the bureaucratic administration, structured by secrecy and corresponding to the aspect of the object.

1789 was finally to bring about a liberalization of the market: government direction and corporatist regulation affecting industry and commerce and acting as a brake on rationality were to be abolished. We speak of

rationalism and not of individualism; article 2 of the Loi Chapelier (14/7/1791; article 1 abrogates corporatist regulations) shows us that ther issue went further: "Citizens in the same estate or profession, business people, shopkeepers, workers, or members of any guild whatsoever may not when assembled appoint any chairman or secretary or syndic nor keep records, take decisions or arrive at conclusions, nor draw up regulations on their supposed common interests".

Had the revolution been individualist, such an article would never have seen daylight. Furthermore, what this shows, and this is very important, is that the "sovereign" subject was in fact sovereign only within the limits asigned to him by the state. Throughout the whole epoch of the "liberal state", this point was to be obscured, notably by the lawyers, in both doctrine and jurisprudence, to reappear - all of a sudden - only with the Third Republic, i.e. with the "social state" (see conclusion).

It was a perverse effect of this revolution - cf. our point II - that while before 1789 the individual was not attached to the state , it was precisely 1789 that attached the subject to the state, making a constitutive dimension of it. The subject was then defined by the state, according to what was a nature of the latter, "the state based on the rule of law" was perhaps to be

not the end of servitude but rather another way of entering it.

Part II: Rationalism and the state based on the rule of law

The state based on the rule of law, as we have said, is the intermeshing of two factors - the public sphere, the bureaucratic administration - that of the subject and that of the object. This intermeshing is not static; by definition it could only be evolutionary. Moreover, this was taken account of in the evolution of the liberal state into the social state. We shall study this evolution from two aspects: the irrationalism and the rationalism of the state based on the rule of law.

A. Rationality at grips with disorder

Where the constitutional regime was formally sanctioned by a legality on which it was based (the constitution), the functions of the public sphere were clearly defined (55).

This means firstly that discussion, among the public, presupposed the questioning of areas which hitherto had not been subject to discussion. In fact, a first series of fundamental rights concerns the public sphere that uses reason (freedom of opinion and the press) and the political functions that private persons carry out within this public sphere (eligibility etc.).

Secondly, this means, that this commerce of society, far from presupposing a social identity, on the contrary presupposes an equality founded upon the value of the person and hence, in principle, this public cannot be closed upon itself: anyone may take a part in it. Thus, a second series of fundamental rights refers to the free status of the individual, to the principle of equality obeyed by proprietors on the market and by educated people.

The principle of equality was first of all a principle of civil society, and was to remain so throughout the 19th century. That is to say, the constitutional norms aimed at producing a model of civil society, but the reality of it in no way corresponded. The idea of access to all public careers, open to all, was at the origin of the bourgeois public sphere, but was also the principle that was its stumbling block (56).

This public sphere of the 19th century remained literary even where it assured political functions, and education was the first condition to fulfill if one wished to belong to it, with ownership being the second. Social antagonisms were to appear for the securing of state power; a process of permanent purgation was to be the counterpart to the rationalism orchestrated by the state apparatus.

The legitimacy that emerged from 1789 was founded upon dialogue: here parliament was the place for critiscal dicussion. But the executive, for its part, conserved this administrative State to make it its mode of government, where power was not discussed.

All the rules of private law are the object of negotiation, like constitutional law, but public law is not the object of discussion. The public sphere, as legally delimited, becomes the ruling principle of the procedures within the state organs; in this sense there appears publicity (parliamentary debates, etc.). But to the extent that the influx proper to their functioning comes from the public sphere, they appropriate it to themselves in a quite specific manner as soon as it has to be applied through their apparatuses.

At the end of the Napoleonic experience, the powerful administration found the monarchical reflex again. This mean chiefly that it reacted to political control when imposed from above. The administration can really direct only by intermediary of a mode of authoritarian government (57).

Power resides in the formula: "The state is democratic from without". With the particularity that, in the period going from the First to the Second Empire, the balance between democratic practice on the one hand and

the authoritarian practice of power on the other had not yet been achieved. It was to be only in the Third Republic.

In fact, while the political public sphere appeared as the place where social antagonisms were expressed, the state apparatus with its executive administration as a privileged means of the exercise of power was unable to support the existence of internal disruptions. The officials thus appear to be at the service of the collectivity; their action was inspired by concern for the general interest. They are not wage earners like others: the civil service became be subjective to a single imperative: hierarchy (58).

Hierarchy, which transforms the subject into object in such a way that everyone sees his compitence delimited by rules - i.e. objectively - was to have difficulties in imposing itself during this period of the liberal state at the top of the state apparatus. The social antagonisms of the public sphere were translated at each election into a crowd of "direct" appointments, thereby provoking a strong politicization of that apparatus.

In such circumstances, the process of objectivization set up for access to power was very much slowed down: it was to become a major political and social phenomenon only once a form specific to the exercise of power could

be picked out.

Altough the functions of the public sphere are clearly defined by the Constitution, the legal value of that constitution is not therefore defined: "It was to be necessity, circumstances, that determined the possibility and conditions of their changes" (59). And to the question who constitutive power belongs to, the following reply was given: " To those who have the power to seize it: it would be dangerous to stir up this problem of constitutive power, which has something mysterious in it, the source of which it would be unwise to disentangle" (60).

This problem regarding the exercise of government comes down to the impossibility of systematizing a process whereby the securing of state power is objectivized.

With 1789, "the equality of access to public employment" resulted from the principle of election behind which could be found the owners, rich merchants, and that practice was soon to become incompatible with Bonaparte's administrative work. No doubt because for him administration was not the place for the subject as conceived within the public sphere , but the place where the subject disappears behind a mechanical functioning of norms (61). But much was still required before such an operation could at the time become systematic. A

decree of 14 Frimaire Year II (articles 20 - 21) had set up a veritable permanent purge in the communes and districts; this decree was to be "canonized" a few years later under the name of "theory of government acts". This theory was intended to legitimize all attacks on officials without the Conseil d'Etat being able to exercise the least control, on the grounds that the decision was of a political nature (62).

This limit to the "purest bureaucratic domination" set up by political conflicts arising from the public sphere likewise brought about a limit to the "purest recruitment", i.e. the procedure of competitive examination.

A limit only; in fact, the imperial university was one of Bonaparte's first concerns: "there will be no fixed political state if there is not a teaching body with fixed principles" (63). In other words, the educational organization was to be the reproduction of the state administration, and its model was to be the Jesuit colleges of the 19th century: the organization of studies, the disciplinary system, the system of classes, boarding, etc,, were reestablished (64), and, of course, so was hierarchy. There was a hierarchy among the taught and among the teachers, and, as we noted for the 18th century, educational hierarchy was imposed in the administrative hierarchy (65), which in turn organized

its own hierarchy inside the educational hierarchy.

Only a limit, again, because the principle of objective regulation within the state apparatus organized by the competitive examination was no longe at dispute. Bonaparte to Napoleon III the principle was never to be questioned again; quite the contrary. Since everyone had understood that the primary issue was cooptation by a constitued body, the members of the selection board and the content of the programmes would change with the regimes, but the principle of the competitive examination was not to be touched (66).

Furthermore, the link between state education and bureaucratic administration can perhaps be maintained only if the State holds a monopoly position in education. That was what the system was evolving towards. The educational hierarchical sequence tended to become purely governmental (67); it led to state examinations where the examiner had been trained within the state apparatus and were state professors. The diploma thereby became a professional qualification excluding any others. A number of authors were to speak against this. In those troubled times, everyone could see that depending on who was in power, such and such a type of a candidate was inevitably accepted and such and such another equally inevitably rejected. To speak like Max Weber, the competitive examination procedure has a

formal rationality as far as the object goes, the public nature of the competitive examination procedure, but also a formal value rationality, with the selection board deciding by secret procedures. In the 18th century (68) it was through the competitive examination procedure that professorial chairs passed from father to son, with scruplous respect for legality. This is precisely the point: the transmission of a heritage. The blood heir of the 18th century was to be succeeded by the spiritual heir of the state based on the rule of law, where the choice was no longer made "primitively" (from subject to subject) but through the mediation of permanent and objective rules.

Therein lies the major limit to the competitive examination procedure in the 19th century. "The liberal state, its mode of construction, the extremity of its powers, its style in submitting ... were rooted in a religion, i.e. a system of belief that brought about authority" (69). The history of canon law shows that administrative law in the modern sense could not arise without a scaffolding of beliefs bringing the political element to the fore" (70).

The belief system worked out within the educational institution, impregnated with utilitarianism and rationalism, was ceaselessly questioned by the "political respondent" (71), both as to the form and as

to the substance (i.e., as to the very existence of the competitive examination). "Belief system" and "political respondent" are linked. To the possibility of setting up beliefs that structure the state apparatus corresponds the possibility for a society of creating a form of power that will maintain the social order on which that society is based. In other words, cooptation, on specialized knowledge, requires not only teaching and administrating but also an order on the basis of which it is auto-legitimized.

What the political sphere of the 19th century in France expresses is precisely these constantly unsuccessful attempts of a society seeking to structure itself.

"The principle of the effectiveness of this performative language - the beliefe system in Pierre Legendre - which brings into existence what it describes, which magically creates what it says in constitutive statements, rests not ... in the language itself, but in the group that authorizes it, which is authorized by it, which recognizes it and which recognizes itself in it" (72).

One of the primary effects of this phenomenon is that a considerable number of legimacy problems can never be discussed; constitutional law, like administrative law, cannot be the object of theorization (cf. page 4 above) Another effect is that competitive examinations in

constitutional law and administrative law for the assignment of a professioral chair could never exist throughout the 19th century.

No teacher of administrative law or constitutional law teaching in the 19th century was in fact appointed by competitive examination (73). Taking as example the University of Paris, the two chairs in Roman Law were assigned by competition, as were the six in civil law. The chair in Administrative Law was assigned by ordinance, as was that of Constitutional Law. At Dijon, all the chairs were assigned by competition, except that of Administrative Law. The same was true at Rennes, where the chair of Administrative Law was assigned to Laferriere by ordinance, etc.

With the teaching of law essentially in the hand of integral monarchists, cooptation to constitutional law was all the more difficult to bring about because discussion on the foundations of the issue went back to a conception of politics that was considerably different from the one for which those organizing the cooptation were opting (74). On the other hand, the competitive examination for a chair in Roman Law or Civil Law, in Latin, posed no problem.

Rationalism had dominated 1789 and was at the basis of the new state field. But at the same time, it had

defined a sphere whose political functioning was a permanent obstacle to the rationalism of the bureaucratic administration. The whole of the 19th century was for this reason a "rationality at grips with disorder".

The first forms of order in the public sphere came from the political parties - centralized and hierarchical - set up by professional politicians. But the order that best organized rationality was the republic, in particular the Third Republic, i.e. the form of transformation and not of conservation of the new society.

II The Republic, as rationalist form of the state based on the rule of law

Any movement coming out of the public political sphere is a danger for the order, i.e. for the "bureaucratic society", which is principally a "technique aiming at efficiency" (75); this public sphere is a constitutive dimension of the state based on the rule of law. There lies the whole contradiction of the parliamentary regime. The only solution consists then in bringing this parliament to calm, i.e. in breaking its political power or more exactly in organizing it. This consisted in making parliament into the place for a "publicity", carried out by professional politicians within parties, reproducing the organization and functioning of the state apparatus, hierarchical and centralized as it was.

Accordingly, the republic sought to set up this blending of democratic practice of power and an authoritarian practice, a blending of the binomial of dialogue and rational authority.

For this reason the republic must appear more as a form of transformation of liberal 19th-century society rather than as one of conservation.

We have seen (above) that the principle of the political public sphere was that of being open to all, and it was

precisely this point that was the stumbling block for this sphere. The principle was to be realized with the republic, and through the operation of a double mediation, from society towards the State and from the State towards society: which brought about the "social state".

The mediation from society towards the State was the creation of the associations (76), (of political parties, of places where private interests required the State to make temporary compromises) which fundamentally remained private bodies organizing relations between parliament and civil society. These organisms accordingly reproduced the mode of operation of the State, in the sense that they sought to secure from the "vassalized" public a plebiscitary support based on political integration of the social body (77).

J. Habermas thus points out that "in the 18th century, publicity had to be imposed by opposing secrecy in politics, and at our time it is only with the help of a policy of secrecy practised by interest groups that publicity is imposed" (78).

Thus, the social State is the state form that realizes the aspiration of the political public sphere; in fact, the principle of equality access to public employment was to become a political and social reality" (79).

But at the same time parliament becomes a place of spectacle, the existence of which remains no less essential because it remains more than ever the sphere where one shows that power is a matter of reason, the reason of the sovereign individual/subject. There will always be a great temptation to stifle parliament, but the latter, as an ostentatory body where power is legitimated through reason, can only live. The way to transcend the contradiction consists in steadily weakening the parliament - to the benefit of the bureaucratic administration - while considerably increasing its publicity.

The period of open war (liberal period) was succeeded by the peace, which consisted in a withdrawal of the dominant social groups from the stage of power. "Thus, the executants of power .. are distinct from the power itself, which arises independently of them" (80).

Parliament is the offical locale for criticism of power; constitutional law - the supreme norm of the machinery of legal rationality - becomes the wise and reasoned expression of the public sphere, a hierarchicalized, centralized sphere where publicity becomes propaganda. (81).

The second aspect of this mediation from society towards the State consists in the increasing officialization of

civil society: equal access to public employment becomes a reality. For this reason, the passage from the liberal State to the social state takes place without break and results from the very character of the political public sphere, open to all. This movement of civil society towards the State is then accompanied by the movement of the State towards civil society.

The mediation of the State towards civil society is the convincing achievement of the process of rationality undertaken by the state based on the rule of law. In this sense, the administrative law was to be a process of milling and modelling the subject on the basis of which the critical public sphere functions. The heterogeneity of the public sphere was to be tempered by the homogeneity of the state apparatus. Free play was to be assumed on the one hand by the hierarchical principle, and on the other by the republican notion of the State, as the articulation of the binomial of the between general interest and official neutrality.

As J. Chevallier and D. Loschak (82) say, "no state apparatus can admit the existence of internal splits", "The officials are at the service of the generality; their actions are inspired by concern for the general interest .. The functioning of the state apparatus is subject to a single impelling force: hierarchy, which involves a system of domination and subordination that

takes the form of a centralization of the powers of decision and of control of inferior grades by superior grades" (83).

This normative model aims primarily at forbidding expression of the antagonisms that run through this state apparatus: the social heterogeneity of recruitment is necessary because it brings about equal access to public employment, the main guiding principle of the political public sphere. But this heterorgeneity, as a source of disorder, was to be opposed by a process of functional homogeneity in the state apparatus.

Since the state apparatus becomes increasingly a mass apparatus, the social stratifications of civil society became transported into it and there appear two great categories of state officials: those charged with execution and those charged with conception (84).

"There is a break in the unity of the administrative milieu and an increasingly clear divergence between the two previously hierarchicalized cultural models: that of the upper administration and the grands corps, based on the cult of the state, of the general interest of efficiency; and that of the small and middle officials, seeking in the administration above all security of employment and social advancement" (85).

The point then becomes to express what the administration ought to be, and the model picked will be the military model, which expresses in the purest possible manner the ideal of such a structure.

The first shot was fired by Hariou (32), for whom the administration ought to be a vast army with a general as its head. All theoreticians of public law were to take up this theme.

Fayol (87) thought that "the essential principle of administrative doctrine is the extreme importance of leadership, since organization is the science of command".

Chardon (88) said: "To bring the masses into motion, to remind them of the goal and help them to reach it, to stop them in their dangerous leaps, protect them against anarchy, there is need of superior wills, tenacious permanent, rigorous and disinterested".

It is through administrative law that one passes from the government of men to the administration of things, the highest stage of democracy in the social State.

The conception of power becomes military: administrative law and military rationalism meet. Real (89) states in this connection: "The General

Headquarters, during the Great War, was doing in fact no more than applying the essence of the rules that administrative doctrine was later to promote: the unity of command, with at the top a commander-in-chief as dispenser of energy. Below, the offices and services that supply the chief with all the elements of knowledge he requires, and pass on to the troops the impulses coming from the chief".

Lyautey (90) explained that "there are not two ways of exercising a colonial command, but only one: it calls for qualities which are both military and civilian, or more exactly administrative .." The role of administrative doctrine then forms part of the logical codification of rules needed in any good organization. But we owe the most powerful formulation to Tarde (91) who explained that the carrying out of a good colonial command "presupposes two distinct elements: a human machine (92) perfectly attuned to the object to be attained: organization. An impulse that sets it in motion and drives it: command. Administrative law is intended to be precisely that: a mechanical arrangement of rules governing objects" (93).

We would wish to take over the position of J. Chevallier and D. Loschak (94) when they feel that "before being justified by a concern for technical efficiency and by practical considerations, the

hierarchical principle is inspired by the desire to assure the political cohesion of the administration". But on condition of seeing that this desire for political cohesion has as its goal a concern for efficiency, i.e. for limiting anything that may constitute a break on rationalism, which knows only efficiency (95).

The process of objectivization that the practice of power tends to realize in a state based on the rule of law has as its starting point the critical public sphere, and as destination the state apparatus. The double motion required - mediation from society towards the State and from the State towards society - then makes the educational apparatus into the essential organ for the rationalization of these two mediations.

It is in fact the hierarchy of knowledge that is to legitimize hierarchical power: "To each according to his merit". The rationalist process that the educational apparatus permits consists in excluding voluntarism for the benefit of objective rules organized around specialized knowledge. This takes up from a long history (see part I above) which draws its his source from the State Church. "Teaching was organized because it was necessary to convert (we say convince) evangelize (we say politicize), in order that the people of God could reproduce themselves" (96).

The homogeneity of the state apparatus was in fact to result from the joint action of two factors: one factor internal to the administration, consisted in admitting the hierarchical principle as the principle ruling the functioning of the service. The other, external to the administration, was that of training future officials by specific education, where knowledge was inculcated within a hierarchical conception.

The principle of criticism-characteristic of the political public sphere - was thus converted into a principle of integration. In the years leading up to a professional qualification, reaching a specific hierarchy of specialized acquired knowledge corresponds to a hierarchical level within the state apparatus or civil society.

This principle of integration, rationally organized, must inevitably become accentuated. A considerable number of types of special education were to be set up for access to public emplyment. R. Castagne de la Jarousse writes in this connection (97): "The administration fears the University, because within it there develops an oppositional mentality ". This teaching effectuates recruitment "on the basis of a special mentality and training, where the spirit of discipline is sovereign" (98): recruitment does not take place directly through the bureaucratic

administration, but by a detour through specialized bodies that subsequently automatically decant their pupils into the state apparatus. The training one receives there "remains theoretical and is not a preparation for the job; it consists of the acquisition of a "general culture", of "round tables". "Competence "is not primary in it, and disappears behind the ideal image of an official (99).

Conclusion

Now that the framework in which the law will act has been set out, we may summarize the jurists' debate within the state based on the rule of law, in particular on the basis of ideas of subjective right and objective right.

Jurists concealed the nature of the revolution: 1789 was considered as the moment of the subject. In other words, the aspect of the public sphere was primary and supplanted the administrative and bureaucratic sphere. The legal argument is simple: the Constitution is the supreme source of the legal order, and the Declaration of the Rights of Man expresses its foundation and its goal. Through the social compact, individuals/subjects have in a sovereign manner set up limits within which liberty would be expressed (Rousseau). The administrative and bureaucratic aspect is the mechanism

whereby the pact will be respected (100).

In consequence, the state based on the rule of law was to be this mechanism whereby the autonomy of the will - the source of all subjective law and the major principle of the contract - was to be guaranteed by rules of law promulgared by the bureaucratic administration or by parliament. This is how in law the notion of the 19th century liberal state was expressed. The rights of the individual are powers lying within his own will: the rule of law has value only to the extent that its object is to protect subjective rights. In this connection, objective right has its foundation in subjective right. The backbone of the legal system is the civil law, the pillars of which are Articles 544, 1134 and 1382. From Article 544 the attempt is made to show that property is absolute; from Article 1134 the absolute freedom of contracting parties is deduced as the sole source of obligations, limited only by themselves, by "self-limitation" of the will. "The 1789 Revolution broke the links which, under the Ancien Regime, bound the individual to the state; it thereby opened an age of individualism. That is the whole spirit of the Declaration of the Rights of Man" (C. Deudant). This opinion is fairly classical, and will summarizes the most widely shared view of what 1789 meant. We know that it is erroneous; that the point was rationalism and not individualism. Not only was the professional

association suppressed (see above), but, likewise, the foundation of a limited company was made subordinate to an authorization granted or refused at the discretion of the administration (until 1867). The republic was to teach that the freedom presupposes freedom of association; the freedom of the 19th-century liberal state was opposed to the freedom of association also through the bias of its administrative and bureaucratic apparatus whereby the subject was milled and moulded.

There was, by the way, no logical reason in the legal area to proclaim the sovereignty of the subject and its ascendancy over the state apparatus. After all, while Article 544 certainly affirms the absolute character of property, the same article states at the end: " .., provided that no use prohibited by law or regulation is made of it." Article 1134 certainly proclaims contracutal freedom and assuredly gives it legal value, but inasmuch as such agreements have been "legally formed". It is therefore quite clear from these two key articles of liberal law that the subject was to be recognized to the extent that it would sacrifice to the commands proceeding from the administrative and bureaucratic sphere. The liberal perception took origin from an economic and political interest, but law as such in no way expressed that, while even case law and doctrine sang to the same tune. We might continue the list of these articles that came to model and give

subject effects to the public sphere; for instance, Article 6 of the Civil Code, where clauses and conventions contrary to public order or good morals are made null. Let us consider the importance of the state intervention allowed by Article 6 in contractual provisions. Article 6 has, furthermore, its corollary in the extension of the public sphere itself into civil society, within this society based on trade; article 1131 declares void any agreement without cause, on a false cause or on an illicit cause. (Article 1133 tells us that illicit means contrary to law, good morals or public order). We well know the results of the theory of cause; an evaluation of the worth of a legal act. This means that, for instance, the act need not be inspired by a motive contrary to the general interest. M. Waline (101) makes the most absolute criticism of this "liberal" reading: "If Article 1134 did not exist, our law would not be what it is, but a different law". It is in any case probable that one would set about inventing it. "The idea of an autonomous will capable of producing legal effects by itself is in absolute contradiction with the existence of Article 1134, which has the precise effect of rendering that will heteronomous". We might say exactly the same thing of property law. It was only the first subparagraph of that article that was taken into account in the 19th century, whereas with the republic and the social State it was above all the last sentence of the article that

was to be paid attention to (102). With the republic, there came about a political blending between the aspect of the subject and the aspect of the object: "public regulation and private initiative are the two terms of the ambivalence that characterizes the authority/subject relationship". The principle of the autonomy of the will as the foundation of the state based on the rule of law was no longer to be applied.

"The individualist doctrine, once considered destined for considerable growth, can not be considered as anything but a historical phase from which society has begun to move away for some time now" (103). A redistribution of roles is then effected. "The social institution can have no other object than to tend towards the perfecting of the species, and the individual ought not to have any other than to tend towards the perfecting of the social institution" (104).

Hauriou (105) was to say in this connection: "At any given moment, a certain equilibrium is established between the social forces, and it is from that equilibrium that the rule of law in force at a given moment is born. Each liberal rule of law is a sort of clause in a treaty of armistice between the social forces " Among these antagonistic forces, Hauriou is thinking chiefly of society and the individual; two equally irreducible elements, since one cannot conceive

of man outside the society of the State, nor of human society without human individuals".

The modern state can then be seen as a "legal equilibrium based on individualism". Hauriou picks out from this two major categories at the heart of the law: a social law elaborated in the political institution in the double form of discipline and statute, and an individualist law constituted principally in the usages of judicial intercourse

The problem of the sources of law then arises. For Hauriou, social law has its origin in the legal creative power of the institutions, and individualist law in the independence of the will. Does this mean that there is a duality of sources of the law, one coming from the public sphere, the other from the state apparatus, operating in parallel? Hauriou inclines to a negative answer: there can be no parallelism; there can only be a blending, to which he gives us the key. The subject acts within the limits set for him by the state, which in turn realizes the general interest; there is the metaphor of the state as a huge park within which traffic is organized and rationalized, and which is closed upon itself. The individual is free to move about within it, provided he keeps off the flowerbeds and avoids forbidden paths (106). As M. Waline pointed out, individualism is then no longer the source of law

but its objective: the sole source becomes the state (107). The definition of the law is once again posed, orienting us either towards the source (state) or towards the objective (individual).

Hauriou's image of the state as a closed park is very powerful. It was what 1789 achieved. The whole social sphere became a closed word tied down within the bonds of the state, and therfore any legality it was because the state based on the rule of law intended to be the kingdom of that law which governs both the individual and the State. But how can the state's sovereignty be reconciled with its neccessary submission to the law? Liberal doctrine was aimed at providing an answer: because the State results from the social contract, it is subject to the laws freely accepted by the individuals. But the proposition falls as soon as the State becomes the sole source of law, leaving only the notion of self-limitation (as in Jellinek or Carre de Malberg), which takes the form of a syllogism: it is part of the very definition of the State for it to have a juridical organization, but the State cannot evade a law without denying its nature; therefore the State can only wish to submit to the law. The individual becomes the objective of this rule, which expresses only the general interest.

This thesis is utterly rejected by Duquit. According to

him, selflimitation is little more than a joke. For him, the neccessary condition of the subordination of the State to the law could result only from a law with a source outside of and anterior to the State (to the will of the legislature or of any organ of the State). In other words, the legal value of a rule is not extrinsic and formal but intrinsic or material. For Duquit, the obligatory character of a rule was not to originate in its formulation by a State authority but in its conformity to the needs of social. solidarity and of justice. " On the positive ground, I seek to determine only the time when a certain rule of which the mass of individuals in a social group has a more or less clear awareness becomes a rule of law".

However, the whole of social life is under the ascendancy of the State, the state sphere and the public sphere to which Duguit refers. M. Waline can easily make the following remark: "But what is a positive law? It is an effectively applied law" and this operation depends solely on the State.

One final question then arises: can there be a creation of subjective rights by individual wills, through the operation of the judicial act? In a rather contradictory fashion, Hauriou answers yes. His concern for liberalism induced him to put forward the autonomy of the will of the subject, but the idea that the sole

source of law came from the State was rather incompatible with that. For Duquit, on the other hand, the answer was no: the legal effect came according to him from the law, but not from the subject, and the theory of the autonomy of the will worked out under the liberal state seem to him to amount to a kind of metaphysics of the subject. "There is no subjective right, but conditions determined by objective law", and the declaration of the will does nothing but condition the application of the law, (this gives the State considerable importance, since it proves to be the sole source of law).

We tend to think that the answer should be no: with the State acting as both instances, the public sphere and the State, all legal production can only be subordinated to it. Gounot (109) writes in this connection "... if society sanctions legal acts is this not because it feels itself concerned in them in certain respects, because it sees in the legally formed contract something welcome in itself, an individual cooperation in the general interest and in social solidarity? .. that in consequence, the foundation and the measure of the contractual obligation are to be sought not so much in the will itself as in the conformity of the willed act with the ideal that the legislator has formulated of the social order of justice?" The idea is immensely rich: on the one hand it affirms the notion that society (the

State) sanctions legal acts by tending fundamentally to express the interest it finds in them as having been carried out under conditions that it has itself laid down ("legally formed"). On the other hand, the autonomy of the will is no longer the "foundation and measure" of the contractual obligation: the latter reflects individual cooperation in the general interest. This is to turn upside down 19th-century jurisprudence, which sought in the intention of the parties the scope of the obligation: henceforth it is proposed that we evaluate the extent to which this individual intention might not be in contradiction with "the social order desired by the legislator". The theory of the cause of the contract here takes on its whole importance.

This perception, which has the virtue of logic, nevertheless has a great defect. It reduces the public sphere to very little! This may be the case in its political dimension, but the reduction is compensated for by a surge of publicity which becomes propaganda (see above). It was possible to produce the political illusion, but the legal one can be only with much greater difficulty: when one is prevented from making a contract according to one's intentions, one can hardly be prevented from seeing the fact. This is all the more clearly felt because the State based on the rule of law functions on the image of the sovereign subject. Doctrine then puts forward an intermediary theory, that

of the contract as "mixed act" (110). Going back to Duquit's idea of the conditional act, M. Waline sets out the double means whereby the contract takes on the effect of law; the contract "triggers off a legal status" to the extent that the contract comes into a category for which the law has laid down rules of public order and where the parties have not made derogations from the model rules laid down in the code". "For the surplus, and only for the surplus, the contracting parties create a situation that they themselves imagine, "... that is the measure of the individualization of their contract".

Firstly, this attempt suffers from a logical error: doubtless the effect of Article 1134 of the Civil Code is to render the contractual will heteronomous, but this characteristic is in no way dialectical. That would be to forget Article 6 of the Civil Code and Articles 1131-1133. "In the last instance", the contractual will is expressed according to the maxim: "everything which is not forbidden is allowed". This is to recognize the primary role of law, and not a contradictory equality between two supposedly mutually enriching aspects.

Secondly, the relationship between subjective and objective situation brought about by the legal act is no more fixed than that brought about between the political public sphere and the State sphere within the state

based on the rule of law; it is evolutionary by nature. These two relationships express the same thing.

The trend that can be picked out from this relationship within a contractual situation was, moreover, already perceived by M. Waline: "The objective character tends increasingly to dominate contractual situations as legislative intervention (111) becomes more frequent and more important. The content of the situation is increasingly exclusively described by objective law" (112). This is also the trend that seems to emerge from the evolutionary relationship between the two aspects of the State based on the rule of law. In this connection, Andre Hauriou wrote: "Is it impermissible to think that, despite the extraordinary conquests of modern science or perhaps because of them, (113) we are on our way - both east and west - towards a sort of generalized equalitarianization of conditions, guaranteed by a strong administrative organization in which there is littel room for liberty ". (114). The State based on the rule of law tends to be the end of liberty in order to maintain equality. We have shown how and why: because of the effect of rationalism.

M. Waline has pointed out (115) that "the exception of illegality severely limits arbitrariness, i.e. the discretionary power of administrative authorities; likewise? Article 1134 is the basis for an illegality

exception that just as much limits the autonomy of the will of contracting parties" and that in this connection "there is no great difference between the situations of public law (situation of an offical) and the contractual situations of private law" (116).

To this we are tempted to reply that there is no reason why it should be any different: as a process of rationalization, the State based on the rule of law organizes an authority sphere within which administrative law intends to be a mechanism governing objects and a public sphere where criticism is transformed into social integration and where the rule of law intends to bring about order. To this extent, instead of saying "illegality exception" (posited by Article 1134 of the Civil Code) we preferred to say "principle of legality on the sole basis of which a subjective right can be founded"

This is not to say the same thing while simply reversing the terms of the proposition. The illegality exception is not a limit to arbitrariness, but a way of excercising it: the law organizes an authority relationship , which means that it delimits an area of objective execution of duty. Any action by a subject carried out outside this area would than be considered as a form of illegality. (see part I).

However, these two spheres are by nature different, and this what in the last instance makes their difference. The public sphere remains the locus of "creative psychology", where "everything which is not forbidden" has only to be done. Conversely, the State apparatus is the locus of the "directive", whose goal we know to be to pick out a conformable attitude where the texts lay down nothing. The directive is the opposite of the maxim whereby "everything that is not forbidden is allowed". The law's desire to rationalize everything, to provide for everything, in order to secure the advantage of effectiveness is, to be sure, the same whether it is exercised in the public sphere or within the State apparatus, but it has to cope with two totally different attitudes: one constituted of submission, the other of submission but also transcendence. It is within this narrow limit that, if the State based on the rule of law is a way of emerging from domination, it may not absolutely necessarily be another way of entering into it.

FOOTNOTES

(1) P. Valery "Regards sur le monde actuel" quoted by A. Brimo, "Les grands courants de la philosophie du droit et de l'Etat". Paris, Pedone 1968 p. 7.

(2) M. Villey "La formation de la pensee juridique moderne" Montechretien 1975, p. 649.

(3) M. Villey, op.cit. p. 540.

(4) M. Villey, op.cit. p. 593.

(5) Ibid, p. 539.

(6) Defining reason, E. Littre was to write: "that which has to do with duty, right, equity, justice". Quoted by A.J. Arnaud, "Critique de la Raison Juridique", Bibliotheque, de philosophie du droit 1981, p. 15.

(7) F. Bacon, quoted by M. Villey, op.cit. p. 536.

(8) A. J. Arnaud, "Critique de la Raison Juridique", p. 31.

(9) M. Villey, op.cit., p. 699.

(10) See Max Weber, Economy and Society providing his reference pp. 349 et sv.

(11) P. Allies, "L'invention du territoire", thesis Montpellier 1978, p. 95.

(12) P. Allies, op.cit. pp. 111-112.

(13) P. Legendre, "Histoire de l'administration" "Themis, p. 502.

(14) M. Weber, op.cit. p. 230.

(15) M. Weber. op.cit. p. 248.

(16) M. Weber, ibid., p. 277.

(17) P. Legendre, "L'amour du censeur, Seuil 1974, p. 1980

(18) M. Weber, op.cit. p. 223 et sv.

(19) P. Nerhot, "Le concours administratif de L'Ancien Regime à nos jours" thesis Montepellier 1981, pp. 21-23.

(20) M. Weber, op.cit. pp. 223-230.

(21) P. Bourdieu, "Le sens pratique" ed. Minuit, 1980, p. 228.

(22) "Only complete institutionalization can make it possible , if not to bring about a completely clockwork economy, at least not to depend on it completely for obtaining the faith and obedience of others and to mobilize their labour force or their fighting force". P. Bourdieu, op.cit. p. 227.

(23) We shall come back to point A and to our second part. See also M. Antoine ""Le Conseil d'Etat sous Louis XV" rev. francaise de sociologie 1968, p. 231.

(24) P. Nerhot, op.cit. pp. 18-22.

(25) Supra, pp. 11-12 *****.

(26) It should further be noted that the same word refers to power and to knowledge+ in fact, it combines the two.

(27) P. Bourdieu, op.cit. p. 230

(28) M. Weber quoted by P. Bourdieu, - J.Cl. Passeron "L'examen d'une illusion", revue francaise de sociologie 1968, p. 230.

(29) M. Weber, Economie et Societe, p. 227.

(30) M. Weber, op.cit. p. 278, very correctly points out that there is a very great difference between an elected officaldom, which is a source of trouble for the formally rational economy, and a technically trained, professional officaldom, seeking what Max Weber calls formal goal rationality. These two types of officaldom came into competition in 1789, with the first predominating initially and Bonaparte imposing the second (see part II).

(31) See p. 8 above. *****

(32) The Marxists, always at the head of the avan-garde when it comes to history, saw in this process an invention of the conscious bourgeoisie" during the 18th century. Cf. P. Allies, op.cit.

(33) See P. Nerhot, op.cit., for a presentation of that Council+

(34) P. Le Bras, "Origines canoniques du droit administratif francais". Melanges Mestre 1956. P. Legendre 2La royaute du droit adminstratif" Sirey 1975.

(35) R. Debray, "Le Scribe", Grasset 1980, p. 257 et sv.

(36) F. Vial, "Trois d'histoire de l'enseignement scondaire2 Paris 1936. Livre I, p. 20 ff.

(37) F. Vial, op.cit., p. 34 ff.

(38) P. Nerhot, op.cit. p. 43 ff.

(39) P. Bourdieu, J.Cl. Passeron "L'examen d'une illusion", p. 235.

(40) P. Bourdieu, "Le sens pratique" ed. de Minuit - 1980, p. 223. Our emphasis.

(41) J. Petot "Histoire de l'administration des Ponts et Chaussees (1599 - 1815) Library Marcel Riviere and Cie. Paris, 1958+ P. Nerhot, op.cit., p. 50 ff.

(42) P. Nerhot, op.cit.

(43) Diderot: "L'education doit etre.utile..F. Vial, op.cit., p. 101.

(44) Pasukanis "La theorie du droit et le marxisme" Etudes et Documentations Internationales 1976.

(45) See P. Allies, op.cit.

(46) J. Habermas, "L'escape public" Payot 1978, p. 29.

(47) Ibid, p. 34.

(48) Ibid, p. 46.

(49) See above, I.

(50) P. Nerhot, op.cit. pp. 29 ff.

(51) Here we are doing nothing more than taking up the masterly analysis of J. Habermas, op.cit.

(52) J. Habermas, op.cit, p. 44.

(53) And Marxism, far from making a break was on the contrary to strengthen this phenomenon.

(54) J. Habermas, op.cit. p. 92.

(55) J. Habermas, op.cit. p. 93.

(56) 1830: ..of the electoral .. bringing the number of electors to 250.000 from 100.000.
1837: Election of twon councils by an electoral college made up of the highest taxed citizens plus the "qualified"
1848: Universal suffrage (of very brief duration)

(57) P. Legendre. Histoire de l'administration, p.

562.

(58) J. Chevallier - D. Loschak - Science administrative. LGDJ 1978 Theme, 1 pp. 330 ff.

(59) Beranger, Rapporteur a la Paris, quoted by P. Bastid, Les insitutions politiqes de la Monarchie parlamentaire - 1814-1848 - Sirey, 1954, p. 164.

(60) Ibid., p. 166.

(61) See note Nr. 30.

(62) In the context of this article, we shall give not an account of this permanent surge. For such a study see in particular P. Nerhot, op.cit, pp. 86 et. seg.

(63) Napoleon Bonapate, quoted by F. Vial, op.cit. p. 182. Decret du 17.3.1808.

(64) P. Nerhot, op.cit. pp. 60 et. seg.

(65) Hence the opposition of the small and medium officials to these competitve examinations seen by them as a practice preventing them from hoping some day become subdirector by "internal promotion".

(66) P. Nerhot, op.cit., pp. 64 et. seg.

(67) Source of permanent conflicts between church and state througout the 19th century. The separation of church and state took place only in 1905.

(68) P. Nerhot, op.cit.

(69) P. Legendre "La royaute du roit administratif" ed. Sirey 1975, p. 142. Our emphasis.

(70) Ibid.

(71) The technical character of education under Bonaparte corresponded to the religious education of Louis XVIII.

(72) P. Bourdieu, "Le sens pratique", ed. de Minuit 1980, p. 188.

(73) After 1848 there was still less question of this with Napoleon III's "caesarism".

(74) The rights of the individual have as their "natural" opponents the integral monarchists, who regretted the existence of this written constitution.

(75) J. Ellul: "La technique ou l'enjeu du siecle", p. 13.

(76) "Authorized", i.e. defined by the Republic in 1901.

(77) In this connection see J. Romciere's work "Les revoltes logiques" (no 1).

(78) J. Habermas, op.cit., p. 20- ...

(79) Thus P. Legendre "Histoire de l'administration", pp. 497 et. seg.

(80) G. Mairet, Histoire des ideologies, Tome II, p. 311.

(81) R. de Jouvenel "La Republique des camarades" 1912+ J. Ellul "Propagandes" Armand Colin 1962, "Metarmorphos du bourgeois , Paris, Calman-Levy 1967.

(82) J. Chevallier - D. Loschak, Science administrative, LGDJ, Tome 1, p. 317.

(83) Ibid, p. 318.

(84) In this connection see Jozan "Reglement de la fonction publique 1987, pp. 566 et. seg.

(85) J. Chevallier - D. Loschak, op.cit. pp. 290 et. seg.

(86) The point here is in no way to carry out a mistral of Hariou. Quite the contrary, we would tend to say; fully aware of what the Republic was seeking to organized he .. proclaimed - through his theory of the institution - the pre-eminence of the legal subject.

(87) Fayet "La doctrine administrative dans l'Etat", Paris 1923, p. 115.

(88) Chardon "L'organisation d'une democratie" Paris 1921, p. 12.

(89) S. Rials "Administration et organisation", ed. Beauchesne, 1977, p. 62.

(90) Lyautey "Du role de l'armee", Paris 1913, p. 9.

(91) Tarde "L'enseignement de Lyautey", p. 22.

(92) Our emphasis.

(93) A. GORZ: "Adieu an pr.. shows that "Power is structural in the sense that it has no subject" Along the same time the analysis given by Max Weber of capitalism, namely the product of universal and meritabel rationalization .. outside time but.. seems to us much more .. than that put foreward by Marx in making up the product of man's alienation.

(94) J. Chevallier - D. Loschak, op.cit. p. 303.

(95) This takes up from J. Ellul's - essential - work, in particular his two books.

(96) R. Debray "Le scribe" p. 43.

(97) R. Castagne de la Jarousse "La formation des attaches d'administrations et d'intendance universitaire par les centres de preparation à l'administration generale", thesis Bordeaux, 1972.

(98) Ibid., p. 77

(99) E. Ayoub "La formation du personnel administratif dans le fonction publique" A. Colin 1969, pp. 20 et.seg.

(100) It is interesting to note that almost all the articles of the Declaration express demands of the literary public sphere of the XVIII Article 1 (equality, liberty) Article 6 (rational consent to taxation), Article 12 (equality of access to public employment) etc.

(101) M. Waline "L'individualisme et le droit", Montchretien 1948 p. 213.

(102) M. Waline op.cit. p. 343 thto us proposes us a new definition of ownership: A right good against the whole world, considered as a passive on subject, and conferring on its holder a series of powers over a thing that are in principle unlimited, save by a written legal text".

(103) Nitti, quoted by M. waline, op.cit. p. 6.

(104) Brunetiere, ibid, p. 6.

(105) M. Hauriou, Principes de droit public. 1910.

(106) Ibid., pp. 551, 696.

(107) M. Waline, op.cit. p. 24.

(108) Ibid., p. 403.

(109) Gounot "L'autonomie de la volonte", (thesis) - quoted by M. Waline, op.cit. p. 204.

(110) M. Waline, op.cit. p. 218.

(111) We would add "and bureaucratic"

(112) M. Waline, op.cit. p. 218.

(113) J. Ellul "Le systeme technicien", B. Charbonneau "Le systeme et le chaos", demonstrate the affirmative.

(114) A. Hauriou, Cours de doctorat, Droit constitutionnel etranger, 1960-1961, p. 44, quoted by L. Sfez "L'Administration prospective". A. Colin 1970, p. 172.

(115) M. Waline, op.cit. p. 170 et. seg.

(116) Ibid., p. 218.

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